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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935
Release No.23448 / October 10, 1984

In the Matter of :

GEORGIA POWER COMPANY :
Atlanta, Georgia

GULF POWER COMPANY :
Pensacola, Florida

(70-6573) :

MEMORANDUM OPINION AND ORDER AUTHORIZING SALE AND ACQUISITION OF UTILITY ASSETS AND DENYING REQUESTS FOR HEARING

1. Introduction

Gulf Power Company ("Gulf") proposes to purchase from Georgia Power Company ("Georgia") a 25% interest in Unit 3 of the Robert W. Scherer coal-fired generating plant now under construction in Monroe County, Georgia. The electric utility unit includes a 50% undivided interest in the property and facilities to be used in common by Units 3 and 4. 1/ Gulf and Georgia are subsidiaries of The Southern Company, a registered holding company.

Gulf's contract with Georgia is for a sale at cost, including carrying charges based upon a weighted incremental monthly cost of Georgia's capital. The cost of the 25% at April 18, 1984 was estimated to be $67,047,000. After closing, Gulf will pay currently 25% of the construction costs incurred by Georgia in completing Unit 3. Gulf estimates that the total cost of acquiring and constructing its 25% of Unit 3 (including estimated allowance for Gulf funds used during construction) will be approximately $182 million.

Georgia would credit to Gulf 25% of investment tax credits earned by Georgia prior to such closing with respect to Unit 3, or about $3.3 million. Gulf also will assume enough of Georgia's federal and state income tax liability on the proposed transaction, so that Georgia will have no after-tax book gain as a result of the proposed transaction. This allocation is estimated at $2.5 million.

1/ Ownership of common facilities will be adjusted among the co-owners on completion so that the common facilities will be owned in the same proportion as the generating units, the adjustment to be based on cost...

Excluding combustion turbines, Georgia owned, at the end of 1983, about 10,000 megawatts (mw), of generating capacity in service. 2/ Georgia is not the sole owner of all its generating facilities. In the case of the newer plants in service, 91.6% of Units 1 and 2 of Scherer, 45.7% of Wansley and 49.9% of the nuclear Hatch plant are owned, in specified percentages, by others. They are Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, and the City of Dalton, nonprofit companies serving Georgia's rural cooperatives and municipalities that acquired from Georgia their interests in these units, at cost, when under construction.3/ They are also 54.3% co-owners of the two units of the nuclear Vogtle plant, which Georgia is constructing.

The Vogtle nuclear units total about 2,300 mw capacity, of which Georgia will own 1,060 mw. Scherer Units 3 and 4, also under construction, are each of 818 mw capacity, of which, as noted, 204.5 mw in Unit 3 is under contract to Gulf. Georgia is sole owner of projects under construction consisting of two hydroelectric facilities of 175 mw capacity and a large pumped storage unit. 4/ Its 1984 budget of $1.5 billion for plant additions includes $830 million for generating facilities.

Georgia is the agent for the co-owners to construct and, on completion, to operate the jointly owned plants. Its sales of interests in these plants included an obligation by Georgia to purchase declining fractions of energy from the co-owners after operation is commenced until such time as the co-owners are expected to require the energy for their own needs. As Georgia does not now need the energy so purchased, nor its own entitlement, it has by contracts arranged to sell, also in declining fractions, the energy output from these plants to non-affiliated utility companies (described as nonterritorial sales). The same arrangements have been made with respect to Scherer Unit 3, in which Gulf is to purchase a 25% interest. In 1983, Georgia generated 53.3 billion kwh and purchased 3.5 billion. It sold 53.4 billion kwh, of which 7.1 billion represented nonterritorial sales.

Excluding a combustion turbine, Gulf owned, at the end of 1983, 1,430 mw of generating plants in Florida, and half, 500 mw, of a new plant of its associate, Mississippi Power Company. It generated 7.7 billion kwh in 1983 and sold or interchanged about 7.4 billion kwh, of which about 1.3 billion were in nonterritorial sales. It has no other generation under construction. Gulf's Florida plants are small and aging. In 1978, it deferred indefinitely a proposed new generating plant in Florida, in favor of participating in Scherer. 5/

2/ Including its half interest in an Alabama generating subsidiary, jointly owned by it and Alabama Power Company, also an associate company in the Southern System.

3/ Georgia Power Company, HCAR No. 21709, 20 SEC Docket 1441 (September 5, 1980); Georgia Power Company, HCAR No. 19751, 10 SEC Docket 909 (November 9, 1976); and Georgia Power Company, HCAR No. 18750, 6 SEC Docket 24 (December 31, 1974).

4/ The pumped storage project is for 847.8 mw. That is not additional capacity. It provides only additional peaking capacity.

5/ See Gulf Power Company, Fla. Comm. Docket No. 800001-EU(CR), Order No. 9628 (November 10, 1980), at 6.

Gulf had, at the end of 1983, net utility plant of $685 million and its capital structure consisted of:

	(In millions)	
Long-term debt	$382	53.7%
Preferred stock	76	10.8%
Common stock	253	35.5%
	$711	100.0%

and no short-term debt. 6/ Its revenues were $433 million and net income, after preferred dividends, of $35.5 million. Its bond coverage ratio was 2.9 times, with a Moody's rating of A, compared to Georgia's Baa. Gulf is capable of financing the purchase and construction.

The application-declaration was filed March 3, 1981 and was duly noticed (HCAR No. 22030, 22 SEC Docket 919, April 27, 1981). The record has been supplemented and the proposal has been amended. Initially, the agreement of February 19, 1981, provided for Georgia to sell to Gulf 25% of Units 3 and 4 of the Scherer plant. The amendment cancelled its proposed purchase in Unit No. 4. In the meantime, construction of Unit No. 3 continued. When filed, the cost of 25% of both units was less than $5 million. By April of this year, as noted, the cost of a 25% interest in Unit 3 totaled about $67 million.

Objections to the proposal were filed by Ratewatch, 7/ which contends that the price is not adequate, and raises other issues. The Georgia Consumers' Utility Counsel ("CUC") also filed an appearance and objections. CUC states that the proposed transaction need not be "at cost" as a matter of law, and urges that Georgia should earn a profit on the sale, which, it is stated, would or may benefit consumers under a 1981 Georgia statue. 8/ Both Ratewatch and CUC request a hearing.

They raise no material issues of fact relevant to the requirements under the Act. A hearing will therefore be denied. 9/ Their objections are without merit, all as indicated below.

6/ Its current short term borrowing authorization is $70 million. The Southern Company, HCAR No. 23253, 30 SEC Docket 102 (March 21, 1984).

7/ Ratewatch is an unincorporated organization of Georgia citizens organized to promote just and reasonable utility rates.

8/ Georgia Code Annotated, §46-2-26.1(c)(1984).

9/ See Heering v. SEC, 673 F.2d 1191, 1192-93 (11th Cir. 1982); The Southern Company, HCAR No. 21766, 21 SEC Docket 380 (October 29, 1980), aff'd without opinion, Herring v. SEC, 672 F.2d 894 (D.C. Cir. 1981); Assoc. of Mass. Consumers, Inc. v. SEC, 516 F.2d 711, 714-16 (D.C. Cir. 1975) Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250, 1267-68 (3rd Cir. 1974); See also Gulf States Utilities Company v. FPC, 411 U.S. 747, 754-55 (1973); City of Lafayette La. v. SEC, 454 F.2d 941, 954-56 (D.C. Cir. 1971).

2. Statutory standards

The sale of an undivided interest in the plant under construction makes Gulf a party to a construction contract, whereby Georgia will complete the plant and be reimbursed currently by Gulf for 25% of the construction costs, after transfer. This construction contract is subject to Section 13(b) of the Act, which requires that the construction be performed at cost. However, Section 13(b) does not apply, as such, to the price for the transfer of the property. Rule 80(b), adopted in 1936 10/, excluded "utility assets" from Section 13.

We note that the agreement of sale signed February 19, 1981, was subject only to approval by this Commission. Very little had then been spent by Georgia on Unit 3. Georgia continued with construction as required by the agreement. Georgia advanced the necessary funds, and under the contract it will be compensated by Gulf for all costs, including its capital charges. These construction costs of Georgia thus may be considered subject to Section 13(b), as having been incurred for Gulf's account, subject to reimbursement after our approval.

To the extent that the contract with Gulf is deemed not for services but a transfer of utility assets, the acquisition by Gulf is subject to Section 10. The principal issue is related to price, as to which Section 10(b) provides that we approve the acquisition unless:

> "(2) in case of the acquisition of securities or utility assets, the consideration, including all fees, commissions, and other remuneration, to whomever paid, to be given, directly or indirectly, in connection with such acquisition is not reasonable or does not bear a fair relation to the sums invested in or the earning capacity of the utility assets to be acquired or the utility assets underlying the securities to be acquired;"

The provisions of Section 10 apply to all acquisitions, from non-affiliates as well as associate companies in a system. But in the case of an acquisition from an associate company, the Act has been interpreted not to permit a sale at a profit. The price is limited to cost. This interpretation has long been followed in the administration of the Act. 11/ This is not the type of case that suggests that a reexamination

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10/ Rule U-13-1, HCAR No. 125 (March 30, 1936), redesignated Rule 80, HCAR No. 2694 (April 18, 1941).

11/ See Consolidated Gas Supply Corp., HCAR No. 22910, 27 Docket 1114, 1115 (April 12, 1983); Central and South West Corp., HCAR No. 22635, 26 SEC Docket 174, 180-81 (September 16, 1982); Kentucky Power Company, HCAR No. 22392, 24 SEC Docket 1099 (February 18, 1982); New Jersey Power & Light Co., HCAR No. 14566 (January 30, 1962); Philadelphia Co. 31 SEC 793, 801-02 (1950); Cambridge Electric Light Company, HCAR No. 7406 (May 13, 1947); West Texas Utilities Co., 21 SEC 566, 573 (1945); The Twin State Gas & Electric Co., 14 SEC 732, 741-744 (1943); Interborough Gas Co., 11 SEC 918, 921-922 (1942); Public Service Company of Indiana, 11 SEC 298, 302-303 (1942); and New England Power Co., 3 SEC 366 (1938).

is appropriate. 12/ It was, as applied to current transfer, merely a corollary of one of the reforms imposed on utility companies by the Act and related legislation to eliminate past inter-company profits from the plant accounts of substantially all utility companies in the United States. 13/ This requirement was directed to operating companies, under Section 208 of the Federal Power Act, Title II of the statute of which the Holding Company Act is Title I. It was included in the list of abuses in Section 1(b)(1) of the Act, characterized as "paper profits from inter-company transactions." This Commission's authority under Section 15 of the Act to require utility subsidiaries of registered holding companies to eliminate past intercompany profits was

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12/ In Cambridge Electric Light Company, id. at 2, the Commission said:

> ". . . viewing the system as a whole, the proposed transfer at a profit must be regarded in the nature of a write-up which would be properly classified in Account 107 of the Uniform System of Accounts prescribed for electric utility companies by the Federal Power Commission and recommended by the National Association of Railroad and Utilities Commissioners. Under the circumstances and considering the potentialities of abuse present in the intra-system profits of the nature involved here (cf. Section 1(b) of the Act), we are of the opinion that the proposed transaction should be so modified as to eliminate its inflationary aspects."

13/ American Power & Light Co. v. SEC., 158 F.2d 771, (1st Cir. 1946), cert. denied, 331 U.S. 827 (1947); Northwestern Electric Co. v. FPC, 321 U.S. 119 (1944); California-Oregon Power Co. v. FPC, 150 F.2d 25 (9th Cir. 1945), cert. denied, 326 U.S. 781 (1946). The latter case includes a concise review of earlier decisions and the legislative background. The Federal Communications Act and the National Gas Act contained parallel provisions.
United States v. New York Telephone Co., 326 U.S. 638 (1946), involved a transfer of property to a subsidiary. The subsidiary was ordered to write off the profit to its parent (AT&T), and the Supreme Court affirmed, noting, "the Federal Power Commission, the Securities and Exchange Commission, and some state Commissions (see the opinion of the New York Public Service Commission in the instant case) have taken the same position concerning interaffiliate transactions as has the Federal Communications Commission." Id. at 655 n.23.

affirmed in American Power & Light Company v. SEC, supra. 14/ Such major writedowns also required corresponding adjustments of capitalization under the Act. They were considered in the Commission's orders on financing and reorganizations under the Act. Georgia wrote off 12% of its plant and Gulf 61%. 15/ There is no basis for the contention or suggestion that the transfer to Gulf should be at a price that reflects a "profit" above cost.

Ratewatch makes the alternative suggestion that the application be denied in the expectation that Gulf would purchase equivalent capacity from Georgia in another plant under construction. Aside from the two small hydroelectric facilities, Georgia has under construction the two coal-fired Units 3 and 4 of Scherer and the two nuclear Vogtle units. One cannot seriously expect that Gulf would take an interest in Georgia's nuclear plant under construction. The decision to replace its coal-fired project in Florida by participation in Scherer was made in 1978. 16/ Unit 3 of the Scherer plant is scheduled to be completed in 1987 at an estimated cost of about $802 million. Unit 4 is scheduled for service two years later at a cost of 6% higher, largely because of additional carrying charges. Total investment in Unit 4 is currently about $20 million or 2.3% of its estimated cost; it is now $270 million for Unit 3, or about 33% of its estimated cost. Ratewatch, disagreeing with the proposed agreement, is urging, in effect, that by our disapproval Gulf may be compelled to accept a 25% interest in the higher cost Unit 4. Ratewatch considers a sale to Gulf of a 25% interest in Unit 4 of greater advantage to ratepayers of Georgia. It is fair to assume for like reasons that Florida consumers served by Gulf would prefer Gulf's choice of Unit 3.

We have no such regional preference, and, above all, the Act does not give us a dispensation to favor Georgia over Gulf, as Ratewatch would have us do. We have no authority to review the merits of Georgia's

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14/ See also Florida Power & Light Co., HCAR No. 2874 (July 11, 1941), Florida Power & Light Co., 15 SEC 85 (1943), and Florida Power & Light Co. 30 SEC 408 (1949).

15/ Georgia Power Company, 8 SEC 656, 664-66 (1941) and Gulf Power Company, 10 SEC 151, 156-58 (1941). Commonwealth and Southern Corporation, the parent of both, and the other party in these proceedings, made the capital contributions needed to maintain a minimum common equity, and dividend restrictions were imposed to assure that equity would increase.

16/ See letter of Gulf Power Company to Florida Public Service Commission dated August 25, 1978 and noted in Gulf Power Company, Florida Commission Docket No. 800001-EU(CR), Order No. 9628 (November 10, 1980), at 6.

construction program, 17/ nor which generating facilities under construction Georgia should retain and which or how much it shall sell. In the present case the choice has been made by agreement between Georgia and Gulf, and our function is to review the transaction to determine whether the terms comply with the standards of the Act, and they do. 18/ We note also that in a recent decision the Georgia Commission stated that in the next financing it will review Georgia's construction program, 19/ and our decision today does not limit the extent of that review nor what Ratewatch may submit to the Georgia Commission.

Ratewatch argues that we cannot grant our approval without an environmental impact statement under the National Environmental Policy Act of 1969 (NEPA). 20/ As we have previously determined, our limited authority with respect to financings subject to Sections 6 and 7 21/ and acquisitions subject to Section 10 22/ does not make NEPA applicable. We have no licensing authority over generating facilities, where they are to be built or the adequacy and need for the facilities. Georgia has chosen the construction site for all four Scherer units, located in Monroe County in Central Georgia, with total capacity of 3272 mw, of which Gulf is acquiring 204.5 mw. Georgia determined the type of units to be built and their priority, and construction will continue as planned, unaffected by the transfer to Gulf or to other co-owners. All units will be operated

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17/ See The Southern Company, HCAR No. 21766, 21 SEC Docket 380 (October 10, 1980), aff'd without opinion, Herring v. SEC, 672 F.2d 894 (D.C. Cir. 1981). Having concluded that we have no authority to review the merits of Georgia's construction program, we deny Ratewatch's Motion for Production of Documents, the subject-matter of which was limited solely to soliciting information about Georgia's construction program.

18/ We note that the arrangement with Gulf is not unlike that extended to non-affiliated co-owners. Georgia had sold 16.5% of Scherer Units 3 and 4, which in 1980 it reacquired at cost, and sold the co-owners 15.5% of Units 1 and 2, also at cost. Georgia Power Company, HCAR No. 21709, 20 SEC Docket 1441 (September 5, 1980).

19/ Georgia Power Company, Ga. Pub. Serv. Comm. Docket No. 3457-U Order (June 1, 1984), at 13.

20/ Section 102(2)(C) of NEPA requires the statement in case of "major Federal actions significantly affecting the quality of the human environment."

21/ See The Southern Company, HCAR No. 21665, 20 SEC Docket 799, 801-02 (July 24, 1980); The Southern Company, HCAR No. 21766, 21 SEC Docket 380-82 (October 29, 1980), aff'd without opinion, Herring v. SEC, 672 F.2d 894 (D.C. Cir. 1981).

22/ Northern States Power Co., HCAR No. 22334, 24 SEC Docket 486, 494-95 (December 23, 1981).

by Georgia and all the electricity generated will enter the transmission network in central Georgia. The transfer of ownership to Gulf, as proposed, divides responsibility for providing capital for Unit 3 between Georgia and Gulf, in accordance with present estimates of their relative needs in the 1990's. 23/ It has no bearing on the environmental effects of the Scherer units either in construction or when in operation, and our approval of the transer is not the kind of "Federal actions" involving NEPA, as heretofore decided.

Finally, CUC has called our attention to a Georgia statute, 24/ passed in 1981, which provides recovery for Georgia ratepayers of their cash contribution to the cost of construction and a portion of the profits on a transfer of ownership of any electric utility plant. He requests that we identify what part of the transaction is a transfer of a utility asset subject to Section 10(b)(2) and what part is a "construction contract" subject to Section 13(b). It is stated that such identification might be helpful in determining "profit" under the Georgia statute.

As we said before, Georgia's obligation to complete the plant for Gulf's account is a construction contract within Section 13(b) of the Act, and the transfer of the constructed part of the facility must also be made, as proposed, at cost. The computation of the transfer price, which is consistent with the Act, includes the incremental cost of capital employed by Georgia and certain tax adjustments, involving both investment tax credits and other income tax effects. The price will exceed Georgia's tax basis for the property, which creates the need for tax adjustments, and will differ in some respects from Georgia's book value. The certificate under Rule 24, which will be filed after the transfer, will provide a detailed price computation as of the closing date, which will be available to the Georgia Commission for any assistance it may provide in the application of the Georgia statute.

The fees and expenses to be incurred in this transaction are expected not to exceed $175,000 for Georgia and not to exceed $2,500 for Gulf. No state or federal commission, other than this Commission, has jurisdiction over the proposed transaction.

23/ Georgia and Gulf have already contracted to sell about 88% of the capacity of Unit 3 to non-affiliates through 1992, with sales phasing out over the following three years. The effect is to postpone the availability of the generation to Gulf until needed.

24/ Georgia Code Annotated, §46-2-26.1(c)(1984).

IT IS ORDERED, accordingly, that the application, as amended be, and it hereby is, granted effective forthwith, subject to the terms and conditions prescribed in Rule 24 promulgated under the Act; and

IT IS FURTHER ORDERED that the requests for hearing be, and they hereby are, denied.

By the Commission.

Shirley E. Hollis

Shirley E. Hollis
Acting Secretary